

RECEIVED
FEDERAL ELECTION
COMMISSION

1
2009 NOV 16 PM 5: 27

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

3
4 CELA

5 FIRST GENERAL COUNSEL'S REPORT

6 MUR: 6198

7 DATE COMPLAINT FILED: June 18, 2009

8 DATE ACTIVATED: August 18, 2009

9
10 STATUTE OF LIMITATIONS: March 21, 2014

11
12
13 COMPLAINANT:

Marilyn Donlin

14
15 RESPONDENTS:

16 Switalaki for Congress, and Michael Norbert
17 Switalaki, in his official capacity as treasurer
18 Committee to Elect Michael Switalaki State
19 Senator, and JoAnn Matiyow, in her official
20 capacity as treasurer

21 RELEVANT STATUTES:

22 2 U.S.C. § 431(2)
23 2 U.S.C. § 431(4)(a)
24 2 U.S.C. § 433(a)
25 2 U.S.C. § 434
26 2 U.S.C. § 441a(a)(1)(A)
27 2 U.S.C. § 441a(f)
28 2 U.S.C. § 441i(e)

29 INTERNAL REPORTS CHECKED:

Disclosure Reports

30
31 FEDERAL AGENCIES CHECKED:

None

32
33 I. INTRODUCTION

34 This matter stems from allegations that Michael Switalaki, a Michigan State Senator,
35 used state campaign funds to announce his intentions to run for a seat in the U.S. House of
36 Representatives. Complainant alleges that the Committee to Elect Michael Switalaki State
37 Senator ("state committee") made, and Switalaki for Congress ("federal committee") accepted,
38 in-kind contributions in excess of the Act's limits when the state committee paid for the event at
39 which Mr. Switalaki announced his federal candidacy. 2 U.S.C. § 441a(a)(1)(A),

10044260501

2 U.S.C. § 441a(f). In addition, Complainant alleges that the state committee violated the Act by failing to register with the Commission as a political committee when it made more than \$1,000 in contributions to support Mr. Switalski's federal candidacy. 2 U.S.C. §§ 431(4)(a), 433(a), 434.

Mr. Switalski and Switalski for Congress do not dispute the basic facts presented in the complaint, but deny violating the Act. Respondents contend that the event was a fundraiser for the state committee, not an event to advocate Switalski's nomination or election to federal office.

As set forth below, we recommend the Commission find no reason to believe that the Committee to Elect Michael Switalski State Senator and JoAnn Matiyow, in her official capacity as treasurer, violated 2 U.S.C. § 441a(a)(1)(A). We also recommend the Commission find no reason to believe that Switalski for Congress and Michael Switalski, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f). Although it does not appear that Switalski for Congress accepted in-kind contributions in excess of the Act's limits, it is likely that the federal committee failed to report an in-kind contribution in violation of 2 U.S.C. § 434. However, because any potential unreported in-kind contribution would be minimal, we recommend the Commission dismiss this matter as to any alleged violation of 2 U.S.C. § 434 by Switalski for Congress and Michael Switalski, in his official capacity treasurer, and send the committee a cautionary letter. Finally, we recommend the Commission find no reason to believe that the Committee to Elect Michael Switalski State Senator and JoAnn Matiyow, in her official capacity as treasurer, violated 2 U.S.C. §§ 433(a) or 434.

10044260502

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Michael Switalaki is a member of the Michigan Senate from the 10th Senate District.

Mr. Switalaki is currently serving his second and final term, due to the term limits of the office.

For more than a decade, his state campaign committee, the Committee to Elect Michael Switalaki State Senator, has held an annual "Michael O'Switalaki Irish Party" as both a fundraiser and a thank-you to the constituents of the district.

Mr. Switalaki is also currently seeking the Democratic Party nomination for the U.S. House of Representatives, 12th Congressional District of Michigan. According to Switalaki, his federal campaign committee, Switalaki for Congress, was created April 6, 2009, and accepted its first contributions on that date. The federal committee's Statement of Organization was filed April 16, 2009. The federal committee has filed two reports with the Federal Election Commission, including the July 2009 and October 2009 Quarterly Reports.

Mr. Switalaki announced his federal candidacy at the March 21, 2009 Irish Party, funded by the state committee. A February 23, 2009 invitation to the Irish Party included several paragraphs describing the food, drink, and entertainment that would be provided, and additionally stated, "I intend to announce what my future plans are that evening." Complaint at 3 and Exhibit 5. Additionally, an article running in the Macomb Daily newspaper on March 22, 2009 indicated that Switalaki would be a federal candidate, and stated, "[b]y the time you read this, Switalaki will have made his announcement Saturday night at his annual Irish-themed party." At the event, which lasted from 6:00pm to 11:00pm, Mr. Switalaki took the stage several times to make various announcements. At approximately 8:00pm, Mr. Switalaki took the stage to announce his candidacy: "Tonight, I am announcing my candidacy for the U.S. House of

10044260503

1 Representatives 12th Congressional District. I am running because I believe I can do a better job
2 for the people of this District." Exhibit 1 and Response at 1.

3 As the Irish Party is an annual fundraiser for the state committee, it was paid for by the
4 state committee.¹ The state committee has not yet filed its 2009 disclosure report with the
5 Michigan Bureau of Elections, so the exact amount of money spent on the event has not been
6 disclosed to the public. However, Mr. Switalski's response states that the event was no more
7 elaborate than it has been in previous years, and that he would have thrown the same event even
8 if he had not been announcing his federal candidacy. Indeed, the event appears to be similar to
9 Mr. Switalski's 2007 Irish Party: both served beer and food from Amore's Family Restaurant,
10 National Coney Island, and Passport Pizza. According to Complainant's itemized calculations,
11 based on the state committee's disclosure forms, the 2007 Irish Party cost \$3,744.20.
12 Complainant alleges that this year's event must have been more expensive than the 2007 event
13 because it featured more food and beer options, such as pasta from Villa Penna, hummus from
14 Jalia's Market, and Guinness imported beer. In his response, Mr. Switalski claims the 2009
15 event cost about the same as the 2007 event, due to cutbacks on other items. Specifically, he
16 held the event at a smaller venue (the VFW Hall instead of Imperial House) and played music on
17 his stereo instead of hiring a band.

18 Mr. Switalski also argues that his announcement took only thirty seconds of the five-hour
19 evening, and that he did not hang any signs, ask for volunteers, or accept contributions for his
20 federal campaign. Switalski for Congress did not accept any contributions either on the day of

¹ Michigan law prohibits corporate and labor union contributions, and limits individual contributions for state senate candidates to \$1,000. Michigan Campaign Finance Act §§ 169.252(1)(b), 169.254, 169.255.

10044260504

1 the event or in the days immediately following. At some point, Switalski for Congress created a
2 website and posted a press release about the announcement.²

3 **B. Legal Analysis**

4 It does not appear that the state committee made, or that Switalski for Congress accepted,
5 in-kind contributions in excess of the Act's limits. While the federal committee arguably
6 accepted a small unreported in-kind contribution from the state committee in connection with the
7 portion of Irish Party expenses that can be attributed to the announcement of Switalski's federal
8 candidacy, the amount involved was de minimis. Further, it does not appear that the Committee
9 to Elect Michael Switalski State Senator violated the Act by failing to register with the
10 Commission as a political committee.

11 **1. Alleged In-Kind Contribution**

12 A contribution is any gift, subscription, loan, advance, or deposit of money or anything of
13 value made by any person for the purpose of influencing any election for federal office.
14 2 U.S.C. § 431(8)(A)(i). Commission regulations define "anything of value" to include in-kind
15 contributions: the provision of goods or services without charge or at a charge that is less than
16 the usual and normal charge. 11 C.F.R. § 100.52(d)(1). The Act limits the contributions a
17 person can make, and a candidate can receive, with respect to a federal election. These
18 contributions cannot, in aggregate, exceed \$2,400. 2 U.S.C. § 441a(a)(1)(A).

19 Although the announcement of federal candidacy is in connection with a federal election,
20 there is no basis to attribute all of the Irish Party costs to this announcement. While this situation
21 was not specifically anticipated by the Commission's regulations, the principles set forth by

² Switalski for Congress was not formed until April 6, 2009, so it seems unlikely that the press release was actually posted on March 21, 2009, the nominal date of release. The press release was paid for by the federal committee.

10044260505

1 regulations addressing allocation of expenses between federal and non-federal candidates apply:
2 expenditures shall be attributed according to the benefit reasonably expected to be derived. *See*
3 *generally* 11 C.F.R. § 106; *see also* AO 2006-11 (Washington Democratic State Central
4 Committee) (concluding that, where Commission regulations did not definitively address the
5 appropriate allocation of payments for the state committee's mass mailing, "it [was] appropriate
6 to apply analogous 'space or time' principles set out in 11 C.F.R. § 106.1(a).") While it is
7 undeniable that the portion of the event at which the federal candidacy was announced is related
8 to a federal election, only a small portion of the event's expenses can be attributed to the federal
9 candidacy. Notwithstanding the fact that the solicitation letter and Macomb Daily article
10 indicate that the announcement was premeditated, rather than spontaneous, Respondent credibly
11 asserts that the annual state committee event would have taken place with the exact same level of
12 expenditures regardless of whether Mr. Switalski announced his federal candidacy. Mr.
13 Switalski asserts that he did not hang signs, ask for volunteers, or accept contributions to his
14 federal campaign that evening, nor is there any information to the contrary. Furthermore, there is
15 no information which disputes the assertion that the announcement of federal candidacy
16 accounted for thirty seconds of the five-hour event.

17 While Mr. Switalski's response did not make any specific representation as to the amount
18 spent on the 2009 Irish Party, he does assert that its costs were approximately the same as the
19 2007 Irish Party, which, according to the state committee's 2007 disclosure report, appear to be
20 \$3,744.20. Given what is known about the Irish Party content and program – particularly the
21 amount of time spent on the announcement compared to the length of the event – the expenses
22 related to the federal candidacy announcement likely amount to no more than a few hundred
23 dollars.

10044260506

Accordingly, we recommend the Commission find no reason to believe that the Committee to Elect Michael Switalski State Senator and JoAnn Matiyow, in her official capacity as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) by making in-kind contributions in excess of the Act's limits. We also recommend the Commission find no reason to believe that Switalski for Congress and Michael Switalski, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting in-kind contributions in excess of the Act's limits.³

While there does not appear to have been an in-kind contribution in excess of the Act's limits, there appears to have been a small in-kind contribution in connection with the Irish Party. Thus, Switalski for Congress appears to have violated 2 U.S.C. § 434 by failing to report this in-kind contribution to the Commission. However, given the minimal amount of this violation, we recommend the Commission dismiss any alleged violation of 2 U.S.C. § 434, and send a cautionary letter to Switalski for Congress.

2. Political Committee Status

When a committee or association receives contributions or makes expenditures in excess of \$1,000 during a calendar year, it becomes a political committee under the Act and must register and report with the Commission. 2 U.S.C. §§ 431(4)(A), 433(a), 434. The Supreme Court has held that only organizations whose major purpose is campaign activity potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). The Commission interprets

³ Although not set forth as an allegation in the complaint, there is a question of whether the prohibitions at 2 U.S.C. § 441(e) and 11 C.F.R. § 110.3(d) are implicated by the conclusion that Switalski for Congress accepted an in-kind contribution from the Committee to Elect Michael Switalski State Senator. Section 441(e) prohibits a federal candidate from receiving funds that are not subject to the limitations, prohibitions, and reporting requirements of the Act. Section 110.3(d) prohibits transfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election. However, given the fact that the amount involved was only a few hundred dollars, an amount that does not rise to a level that would warrant use of the Commission's limited resources, coupled with the complaint's lack of a specific allegation regarding any violation of these provisions, we make no recommendation with respect to this question.

1 this major purpose test as limited to organizations whose major purpose is federal campaign
2 activity. See Political Committee Status: Supplemental Explanation and Justification, 72 Fed.
3 Reg. 5595, 5597, 5601 (Feb. 7, 2007).

4 Because there is no information that it received any contributions, the Committee to Elect
5 Michael Switalski State Senator could only qualify as a political committee under the Act if: (1)
6 the Irish Party constituted an expenditure of at least \$1,000 for the purpose of influencing a
7 federal election; and (2) the committee's major purpose is federal campaign activity. As
8 discussed above, there is no evidence that the federal portion of the expenditures for the Irish
9 Party reached the \$1,000 threshold. Furthermore, even if there was a federal expenditure of
10 \$1,000, the state committee's major purpose was not federal campaign activity. On the contrary,
11 the committee was formed for the purpose of electing Michael Switalski to the office of State
12 Senator, and has spent several hundred thousand dollars for that purpose. Accordingly, we
13 recommend the Commission find no reason to believe that the Committee to Elect Michael
14 Switalski State Senator and JoAnn Matiyow, in her official capacity as treasurer, violated
15 2 U.S.C. §§ 433(a) and 434 by failing to register and report to the Commission as a political
16 committee.

17 **III. RECOMMENDATIONS**

- 18
- 19 1. Find no reason to believe that the Committee to Elect Michael Switalski State
20 Senator and JoAnn Matiyow, in her official capacity as treasurer, violated
21 2 U.S.C. § 441a(a)(1)(A).
22
 - 23 2. Find no reason to believe that Switalski for Congress and Michael Norbert
24 Switalski, in his official capacity as treasurer, violated 2 U.S.C. § 441(a)(f).
25
 - 26 3. Dismiss, as a matter of prosecutorial discretion, any allegation that Switalski for
27 Congress and Michael Norbert Switalski, in his official capacity as treasurer,
28 violated 2 U.S.C. § 434, and send a cautionary letter.
29

4. Find no reason to believe that the Committee to Elect Michael Switalski State Senator and JoAnn Matiyow, in her official capacity as treasurer, violated 2 U.S.C. §§ 433(a) and 434.
5. Approve the attached Factual and Legal Analysis.
6. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

11-16-09
Date

BY:

Kate Gite
Kathleen Guith
Deputy Associate General Counsel

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Margaret Ritzert
Margaret Ritzert
Attorney

Attachments:

1. Invitation dated February 23, 2009
2. Factual and Legal Analysis